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No.

IN THE

Supreme Court of the United States

CAROL M. KONKEL,

Petitioner,

v.

BOB EVANS FARMS, INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the Fourth Circuit Court of Appeals violate the Petitioner's Seventh Amendment right to a jury trial when it ordered a remittitur of a federal jury's compensatory damages award from $1 million to $25,000?

Did the Fourth Circuit Court of Appeals violate the Petitioner's Seventh Amendment right to a jury trial when it decided it need not even consider whether the Petitioner was entitled to punitive damages?

PARTIES TO THE PROCEEDING

Ecolab, Inc., was originally a defendant in this case. However, Petitioner dismissed her claims against Ecolab, Inc. prior to trial. Ecolab, Inc. was not a party to the appeal to the Fourth Circuit Court of Appeals, and is not a party to this proceeding.

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Petitioner, Carol M. Konkel ("Mrs. Konkel"), respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case against Bob Evans Farms, Inc. ("Bob Evans").

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") is reported at *Konkel v. Bob Evans Farms, Inc.*, 165 F.3d 275 (4th Cir. 1999) (App. A.) The Order denying Mrs. Konkel's petition for rehearing with suggestion for rehearing *en banc* is not published, but is attached as Appendix G. The opinion and order of the federal district court in *Konkel v. Bob Evans Farms, Inc.*, Civ. No. CA-96-20-H, denying Bob Evans' Fed. R. Civ. P. 59(a) motion for a new trial on the grounds of verdict excessiveness are not published, but are attached as Appendix C and D. The relevant hearing transcript excerpts and order of the federal district court denying Mrs. Konkel's motion for summary judgment and granting Bob Evans' motion in limine with respect to Mrs. Konkel's claim for punitive damages are attached as Appendix E and F.

STATEMENT OF JURISDICTION

The judgment of a panel of the Fourth Circuit was entered on January 4, 1999. On April 26, 1999, the Fourth Circuit denied a timely petition for rehearing and suggestion for rehearing *en banc*. The vote on the petition for rehearing *en banc* was 9 to 4.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULES INVOLVED

The Seventh Amendment to the United States Constitution provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by the jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Federal Rule of Civil Procedure 59(a)(1) provides:

> A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the Courts of the United States. . . .

Federal Rule of Civil Procedure 54(c) provides:

> A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, any final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleading.

Federal Rule of Civil Procedure Rule 56 provides in pertinent part:[1]

> (a) A party seeking to recover upon a claim . . . may . . . move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.
>
> (c) . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .
>
> (e) . . . When a motion for summary judgment is made and supplied as provided in this rule, an adverse party may not rest upon the new allegations or demands of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If the adverse party does not so respond, summary judgment if appropriate, shall be entered against the adverse party.

STATEMENT OF THE CASE

A. Mrs. Konkel's Compensatory Damages Award

The fundamental issue with respect to Mrs. Konkel's compensatory damages award is whether the Seventh

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1. The full text is set forth in Appendix H.

Amendment requires that she is entitled to have her compensatory damages for pain and suffering determined by a jury, or whether a Court of Appeals may substitute its own judgment for that of the jury. By remittitur, the Fourth Circuit reduced the federal jury's award of $1,000,000 to $25,000, an unheard of reduction of more than 97%. The Fourth Circuit's decision is in direct conflict with this Court's admonitions with respect to the Seventh Amendment right to a jury trial in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 135 L. Ed. 2d 659 (1996); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 140 L. Ed. 2d 438 (1998) and *Hetzel v. Prince William County*, 118 S. Ct. 1210 (1998). The Fourth Circuit's decision also conflicts with the Third Circuit Court of Appeals' decision in *Smith v. Coy*, 460 F.2d 1226 (3rd Cir. 1992). The Fourth Circuit's decision also conflicts with the applicable law as set forth in the decisions of the Pennsylvania Supreme Court. Finally, the Fourth Circuit's decision also deviates so substantially from the accepted and usual course of judicial proceedings as to require that this Court exercise its supervisory power to reverse the decision and reinstate the jury's verdict.

On the evening of March 22, 1992, Mrs. Konkel suffered severe, permanent injuries to her esophagus when she was served a caustic chemical cleaner instead of hot water for her tea at a Bob Evans restaurant in Carlisle, Pennsylvania. Bob Evans admitted in its Answer that the product Mrs. Konkel swallowed, known as "Finish", is a high alkali, caustic, industrial strength cleaner. The cleaner was used in a highly concentrated form to remove stains from Bob Evans' coffee pots. Mrs. Konkel was injured when a Bob Evans waitress refilled Mrs. Konkel's tea carafe with what appeared to be hot water from a coffee pot sitting in the food preparation area of the restaurant. Unfortunately for Mrs.

Konkel, the coffee pot did not contain clean hot water. Instead, because it was in the process of being destained, it contained a highly concentrated solution of the high alkali, caustic chemical cleaner.

The moment she swallowed the caustic cleaner, Mrs. Konkel's esophagus was irreparably and permanently damaged. She immediately felt a burning pain radiating in her chest from her esophageal chemical burns, which continued as Poison Control was called. The burning pain continued as she was diagnosed and treated for her esophageal chemical burns a short time later by a board certified emergency room physician.

Mrs. Konkel's treating physician, Dr. Nicholas Snow, who is board certified in both internal medicine and gastroenterology, testified that a battery of objective tests ruled out reflux disease, cancer, esophagitis, and benign tumors, and established that Mrs. Konkel's continuing pain is caused by heightened visceral nociception ("HVN") of the esophagus caused by her ingestion of the caustic cleaner. HVN is a condition in which the pain nerves in Mrs. Konkel's esophagus send pain impulses to her despite receiving only the most ordinary stimuli. Eating or drinking anything other than the most bland foods causes Mrs. Konkel's damaged pain nerves to start firing, and the pain continues for hours, days, or weeks. Once the burning sensation starts, there is nothing she can do to stop it. Mrs. Konkel's condition is getting worse as the damaged nerves "recruit" surrounding tissues, causing them to send additional pain impulses.

At the time of the trial, over three years after the event at the Bob Evans restaurant, Mrs. Konkel's condition had gotten progressively worse. She has chronic burning in her

chest. If she drinks or eats she has pain. The pain is best reduced if she does not eat anything. Mrs. Konkel's diet is limited to soggy cereal flakes, plain yogurt, soft bananas, mashed potatoes, noodles, and creamy rice. She cannot drink most beverages, including soft drinks, fruit juices, lemonade, beer or wine.

There is no cure for Mrs. Konkel's condition. Even Bob Evans' medical expert, Dr. Kalloo, admitted at trial that the "cure" for Mrs. Konkel's HVN condition is to avoid those foods that cause her pain, which is virtually everything she used to eat. Over her remaining life expectancy of almost 30 years, Mrs. Konkel will never again eat a normal meal without experiencing pain.

For two days, seven jurors and a federal trial court judge had the opportunity to hear and observe Mrs. Konkel, her treating physician (Dr. Snow), and several other witnesses testify about the devastating effects of her injuries. The jury was instructed — without objection — that under Pennsylvania law, Mrs. Konkel was entitled to compensation for each of the following elements of her damages: past, present and future physical pain, mental anguish, embarrassment, humiliation, inconvenience, and loss of enjoyment of life. After due deliberation, the jurors awarded Mrs. Konkel $1 million for these damages.

The jurors' unanimous verdict was reviewed by the trial court judge under a Fed. R. Civ. P. 59(a) motion for excessive verdict. In his decision, the trial court judge explained in detail that the verdict was appropriate, noting that the jury had properly concluded that Mrs. Konkel had suffered a permanent, devastating physical injury and had compensated her accordingly. Significantly, the trial court judge

specifically ruled that the award was appropriate even in the absence of so-called special damages, stating:

> Furthermore, the court does not accept the defendant's contention that plaintiff's election not to present medical specials renders the jury verdict excessive. There is no dispute that plaintiff visited an emergency room, had follow-up treating care and saw outside specialists for her condition. *Even the defendant's consulting physician could not tell the jury that the emergency room diagnosis [of esophageal chemical burns] was wrong.* In fact, he steered clear of such assertion. Moreover, there was evidence, which the jury had the right to accept and apparently did accept, that showed *plaintiff suffered a serious but essentially untreatable condition whose duration was indefinite but likely permanent.*
>
> *The defendant* had a right to assail the absence of any special damages when its counsel argued the matter before the jury and, in fact, *asked the jury to assess that in arriving at its verdict.* However, *the absence of special damages does not necessarily, and certainly does not legally, denigrate the magnitude of the impact plaintiff's medical condition has on her life. Obviously the jury concluded the impact was great and compensated her accordingly.*

(App. D at 24a-25a) (emphasis added).

On January 4, 1999, a panel of the Fourth Circuit reversed the trial court judge's affirmation of the

compensatory damages award, and instead ordered a reduction of the $1 million award to $25,000, an unheard of reduction of more than 97%. On April 26, 1999, by a 9 to 4 vote, Mrs. Konkel's petition for rehearing with suggestion for rehearing *en banc* was denied. This timely petition for writ of certiorari follows.

B. Mrs. Konkel's Punitive Damages Claim

In the original motion for judgment filed in state court in this case, Mrs. Konkel alleged that Bob Evans "recklessly" served Mrs. Konkel with what Bob Evans admitted in its answer is a "high alkali caustic industrial strength cleaner containing numerous hazardous materials." Mrs. Konkel asked for compensatory damages and all other relief to which she was entitled, but did not specifically request punitive damages in the *ad damnum* of her initial pleading. The case was removed pursuant to 28 U.S.C. §§ 1332 and 1441 to the federal district court for the Western District of Virginia.

The parties agree that Pennsylvania law applies as to liability and damages. "Reckless" behavior is sufficient for an award of punitive damages under Pennsylvania law; willful misconduct is *not* required. *Ivins v. Celotex Corp.*, 115 F.R.D. 159 (E.D. Pa. 1986.)

The packet of "Finish" served to Mrs. Konkel contained numerous warnings that the product causes severe burns, is harmful if swallowed, and should be kept away from skin, eyes and mucous membranes. The "Finish" chemical cleaner in solution has the appearance of ordinary tap water. During his deposition and at trial, Richard Giardullo, the Bob Evans manager in charge of the restaurant where Mrs. Konkel was injured, testified that the "Finish" chemical cleaner was used

to destain coffee pots *not* back in the sink area, away from where food was being prepared, but by placing the chemical in the coffee maker basket and "brewing" the Finish at the very same coffee stations where beverages were being prepared to be served to customers. Mr. Giardullo testified that this same "cleaning-by-brewing" procedure had been in place since the restaurant had opened.

During pretrial discovery, Carl Kinderwater, the chemical manufacturer's representative in charge of servicing the Bob Evans restaurant in Carlisle, testified in deposition that he specifically told Bob Evans' employees, including restaurant manager Richard Giardullo, that if "Finish" was to be used to destain coffee pots, the destaining should be done in a sink in the back room of the restaurant, not in the food service area.

In addition to Mr. Kinderwater's deposition testimony, documents produced in discovery established that more than a year before Mrs. Konkel was injured, Bob Evans had a written procedure that coffee pots were to be destained in the back sink area, away from the food preparation area, where they were to be soaked overnight, rinsed, and then put through the automatic dishwashers before being brought back to the food service area.

Shortly after discovering in Mr. Kinderwater's deposition that Bob Evans' restaurant manager had been specifically instructed to use the "Finish" chemical cleaner in the back sink area, and before Bob Evans had taken the deposition of Mrs. Konkel, Mrs. Konkel supplemented her interrogatory answers to state that she was also seeking punitive damages against Bob Evans to the maximum extent permitted by law.

After the close of discovery, Mrs. Konkel filed a Fed. R. Civ. P. 56 motion for summary judgment with respect to Bob Evans, including a motion for summary judgment with respect to punitive damages. In her motion, Mrs. Konkel pointed out that it was undisputed that Bob Evans knew that the "Finish" chemical solution could cause severe burns, knew that the "Finish" chemical solution was visually indistinguishable from plain tap water, and knew that the coffee pots were being destained by brewing the "Finish" solution next to other coffee pots being used to serve customers. Mrs. Konkel argued that she was entitled to punitive damages as a matter of Pennsylvania law for this reckless conduct. *Ivins v. Celotex, supra.*

In response, Bob Evans simply asserted that Mrs. Konkel was not entitled to punitive damages because she had not requested them in the *ad damnum* of her initial complaint, and that she was not entitled to punitive damages unless she was first awarded compensatory damages. *Bob Evans offered no other opposition to Mrs. Konkel's motion for summary judgment with respect to punitive damages.*

At the hearing on the parties' cross-motions for summary judgment, the district court denied Mrs. Konkel's summary judgment motion on punitive damages, and held that Fed. R. Civ. P. 54(c) did not permit Mrs. Konkel to seek punitive damages if they had not been specifically requested in the *ad damnum* of her original complaint. The district court then denied Mrs. Konkel's immediate oral motion at the hearing for leave to amend her *ad damnum* to seek punitive damages. (Appendix F at 37a.)

In its January 4, 1999 Order, the Fourth Circuit declined to address in any substantive manner Mrs. Konkel's cross-

appeal with respect to her claim for punitive damages. Instead, in a footnote, the Fourth Circuit stated that it need not even consider the punitive damages issues raised because it had decided, without the benefit of any trial on the matter, that it was "obvious" that the "facts" would not justify an award of punitive damages. On April 26, 1999, by a 9 to 4 vote, Mrs. Konkel's petition for rehearing with suggestion for rehearing *en banc* was denied. This timely petition for writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE FOURTH CIRCUIT'S DECISION TO SUBSTITUTE ITS JUDGMENT FOR THAT OF THE JURY AS TO THE AMOUNT OF COMPENSATORY DAMAGES VIOLATES THE SEVENTH AMENDMENT.

The Fourth Circuit's 97% remittitur of the federal jury's compensatory damages award violates the Seventh Amendment, prior decisions of this Court, the decision of the Third Circuit in *Smith*, and the generally accepted and usual course of judicial proceedings. If left to stand, it will signal that Courts of Appeals, not federal juries, are free to make their own *de novo* determinations of unliquidated damages to be awarded to injured persons.

In *Gasperini*, this Court reaffirmed the Seventh Amendment right to a jury trial, and expressly held that a federal trial judge's determination whether a jury's compensatory damages award is excessive is to be reviewed by an appellate court solely for abuse of discretion, giving

"the benefit of every doubt to the judgment of the trial judge". 135 L. Ed. 2d at 679. In *Gasperini*, the Court specifically noted the special role federal trial court judges, and *not* appellate courts, have in reviewing verdicts for excessiveness: "Trial judges have the 'unique opportunity to consider the evidence in the living courtroom context' . . . while appellate judges see only the 'cold paper record." *Id.* at 680 (citations omitted). The Court made clear that appellate review of the trial court's decision on excessive verdict claims was extremely limited; anything more would violate the Seventh Amendment.

Just last year, this Court once again emphasized the importance of allowing *juries* to make determinations of compensatory damages under the Seventh Amendment:

> It has long been recognized that "by the law the jury are judges of the damages. . . ." (citations omitted). Thus in [1935] the [Supreme] Court stated that "the common law rule as it existed at the time of the adoption of the Constitution" was that "*in cases where the amount of damages was uncertain* [,] *their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it.*"

Feltner, *supra*, 140 L. Ed. 2d at 448-49, *citing Dimick v. Schiedt*, 293 U.S. 474, 79 L. Ed. 603, 55 S. Ct. 296 (1935) (emphasis added). Neither *Feltner* nor *Gasperini* overturned the longstanding principal stated in the 1935 decision in *Dimick* that *juries*, not appellate courts, are to determine the amount of compensatory damages in cases such as this. Indeed, in *Hetzel*, this Court specifically instructed the Fourth Circuit that the Seventh Amendment requires *jury* determinations of compensatory damages.

As the Third Circuit has noted, "it is not our privilege to substitute our judgment for that of the trial court as to the maximum amount which will provide fair recompense for injuries which cannot be equated in any mathematical way with any number of dollars. . . ." *Smith*, *supra*, 460 F.2d at 1228 (citation omitted).

In discarding the jury's verdict and imposing its own view of the appropriate amount of Mrs. Konkel's compensatory damages for her injuries, the Fourth Circuit usurped the role of the jury and the trial court judge. The Fourth Circuit's decision in this case is in direct conflict with the Seventh Amendment. It is in direct conflict with the prior decisions of this Court in *Gasperini*, *Feltner*, *Dimick*, and *Hetzel*. It is in conflict with the decision of the Third Circuit in *Smith*. If left to stand, it will permit Courts of Appeal to run roughshod over the Seventh Amendment.[2]

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2. The alternative of offering Mrs. Konkel a new trial instead of accepting the Fourth Circuit's remittitur does not cure the Seventh Amendment violation. A Court of Appeals should not be permitted under *Gasperini* or the Seventh Amendment to substitute its opinion of an appropriate compensatory damage award for the decision of a federal jury, and then insulate that decision by offering the person whose Seventh Amendment rights have been violated the "option" of a new trial.

II.

THE PETITION SHOULD BE GRANTED BECAUSE IN SUBSTITUTING ITS JUDGMENT FOR THAT OF THE JURY AS TO THE AMOUNT OF COMPENSATORY DAMAGES, THE FOURTH CIRCUIT IGNORED THE APPLICABLE SUBSTANTIVE LAW AS SET FORTH IN THE DECISIONS OF THE PENNSYLVANIA SUPREME COURT.

Under *Gasperini*, a federal trial court judge's review of a verdict for excessiveness is done by application of state law. Here, because the injury occurred in Pennsylvania, Pennsylvania law applies. The Fourth Circuit's 97% remittitur conflicts with the applicable substantive law as set forth in the controlling decisions of the Pennsylvania Supreme Court. Pennsylvania law provides that a jury's verdict is to be affirmed by the trial court judge unless it is so outrageous as to shock the trial court's conscience. That is precisely the standard the federal trial court judge followed in this case, and the Seventh Amendment and *Gasperini* require that his decision be affirmed.

In *Catalano v. Bujak*, 537 Pa. 155, 642 A.2d 448 (1994), the Pennsylvania Supreme Court made clear that jurors' verdicts are to be affirmed by the trial court judge unless they "shock the conscience" of the trial court judge:

> The Court is not warranted in setting aside, reducing, or modifying verdicts for personal injuries unless unfairness, mistake, partiality, prejudice, or corruption is shown, or the damages appear to be grossly exorbitant. The verdict must be clearly and immoderately excessive to justify

> the granting of a new trial. *The amount must not only be greater than that which the Court would have awarded, but so excessive as to offend the conscience and judgment of the Court.*

642 A.2d at 451 (emphasis added). The Pennsylvania Supreme Court in *Catalano*, like this Court in *Gasperini*, emphasized the deference to be given trial court judges:

> It is the duty of the lower Court to control the amount of the verdict. It is in possession of all of the facts as well as the atmosphere of the case, which will enable it to do more even-handed justice between the parties than can an appellate court.

Id. at 450 (citation omitted). Other decisions of the Pennsylvania Supreme Court are in accord. *Haines v. Raven Arms, Donn's, Inc.*, 536 Pa. 452, 455, 640 A.2d 367, 369 (1994) ("[T]he excessiveness of the verdict is peculiarly within the discretion of the trial court. . . ."), and *Kiser v. Schulte*, 538 Pa. 219, 225, 648 A.2d 1, 4 (1994) ("If the verdict bears a reasonable resemblance to the proven damages, it is *not* the function of the court to substitute its judgment for the jury's.") (Emphasis added.)

In *Botek v. Mine Safety Appliance Corp.*, 531 Pa. 160, 611 A.2d 1174 (1992), the Pennsylvania Supreme Court emphasized that the *trial court judge* is in the best position to determine whether the jury's verdict is excessive:

> We have held on numerous occasions that whether to grant a new trial because of excessiveness or inadequacy of the verdict is a matter within the

> sound and peculiar discretion of the trial court, which has observed the demeanor of the witnesses. . . .

611 A.2d at 1176. The *Botek* court's admonition is particularly instructive in the present case:

> [T]he reason the [appellate court] felt free to substitute their judgment for that of the trial court and grant the drastic remittitur they did in this case was that they did not regard Plaintiff-Appellant's emotional and psychological injuries as serious or as entailing real pain and suffering. *We think that this was an erroneous usurpation of the primary function of the jury and the trial court.* It is simple black letter law that a tortfea or must take its victim as it finds him. Plaintiff-Appellant suffered objective measurable observable physical injuries here (although they were relatively mild). *All of the consequent psychological and emotional pain and suffering is compensable in that situation, and our law has long so held under the so-called "impact rule."*

Id. at 1177 (emphasis added).

Catalano, *Haines*, *Kiser*, and *Botek*, all recent Pennsylvania Supreme Court cases cited by Mrs. Konkel to the Fourth Circuit, were neither cited nor distinguished in the Fourth Circuit's January 4, 1999 decision.

Here, the federal trial court judge, in reviewing the jury's verdict on a Fed. R. Civ. P. 59(a) motion, stated in detail the specific reasons why the jury's award was appropriate, not

excessive, and why he was "convinced" that the verdict was not a miscarriage of justice. He specifically addressed the medical evidence, the evidence of her damages, and the issue of medical specials. His refusal to overturn or reduce the jury's verdict was consistent with Pennsylvania law, was well within his discretion, and should have been affirmed. Instead, by substituting its own view of an appropriate award, the Fourth Circuit ignored Pennsylvania law as set forth in controlling Pennsylvania Supreme Court decisions. In doing so, the Fourth Circuit violated the Seventh Amendment and *Gasperini*, and deviated completely from the accepted and usual course of judicial proceedings.

The Fourth Circuit attached significance to the fact that Mrs. Konkel chose not to seek to recover for her medical expenses. Mrs. Konkel's permanent injuries occurred the instant she swallowed the chemical solution. While Mrs. Konkel introduced evidence of the numerous medical tests performed on her by various physicians, those tests were diagnostic in nature and ruled out other possible causes of her esophageal pain. She chose not to introduce in evidence the expenses she incurred for those medical services, did not seek to have the jury compensate her for those medical expenses, and the damages instruction to the jury did not list medical expenses as an item to be involved in the jury's award of damages. The fact that Mrs. Konkel did not ask the jury to compensate her for the medical expenses she incurred does not diminish the uncontradicted evidence of her pain and suffering, permanent injury, and the devastating impact that the injuries have had on her life, which is the evidence the jury relied upon in making its compensatory award. The Fourth Circuit's focus on so-called specials was in direct conflict with controlling Pennsylvania Supreme Court decisions.

In particular, the Fourth Circuit completely ignored *Botek*, *supra*, which specifically affirmed a jury's award of significant compensatory damages despite the absence of any wage loss evidence, significant medical specials, or "objective" medical evidence. In *Botek*, the Pennsylvania Supreme Court reinstated a jury's compensatory damage award of $350,000 for emotional distress. The plaintiff in *Botek* passed out when exposed to carbon monoxide and, as a result, was subsequently diagnosed as having post-traumatic stress disorder. At the time of his trial, he had been suffering from nervousness, insomnia, and emotional ills for approximately seven years. His special damages were less than $800. He had no wage loss claim. He did not consult a physician until one year after the incident. There was no evidence of organic brain dysfunction, and "no objective scientific tests" to confirm the existence of any injury to him. His evidence of damages was his own testimony and that of an expert psychiatrist who testified that the plaintiff suffered from post-traumatic stress disorder. The evidence was that his emotional difficulties were not permanent, but could be cured in the future with therapy. The jury awarded compensatory damages in the amount of $350,000, and the trial court judge denied the defendant's motion to set aside the verdict as excessive. An intermediate appellate court ruled that the damages were excessive.

In reversing the intermediate appellate court and reinstating the jury verdict, the Pennsylvania Supreme Court in *Botek* held:

> The jury in the instant case listened to uncontradicted expert medical witnesses . . . They heard Plaintiff-Appellant testify, and they concluded that Plaintiff-Appellant suffered

> substantial long-term mental and emotional ills as a result of [the defendant's] admitted negligence. They decided to compensate him for that suffering at the rate of $50,000 per year. *That was reasonable and that is where the matter should have ended.*

611 A.2d at 1177 (emphasis added).

Botek is directly on point, but was not even cited or discussed in the Fourth Circuit's January 4, 1999 decision. It is simply inconceivable to suggest that the federal trial court judge abused his discretion in this case by following the very same analysis approved by the Pennsylvania Supreme Court in *Botek*. Instead, it is clear that the Fourth Circuit ignored *Botek* and simply substituted its own judgment as to the amount of damages Mrs. Konkel should be awarded.

Thirty years prior to *Botek*, the Pennsylvania Supreme Court had expressly rejected the suggestion that the amount of compensatory damages is somehow linked to the amount of special damages in *Carminati v. Philadelphia Transp. Co.*, 405 Pa. 500, 176 A.2d 440 (1962). The *Carminati* court affirmed a compensatory damages award of almost $80,000 in 1962 dollars for pain and suffering even though the medical expenses were less than $200. The *Carminati* court rejected the defendant's attempt "to prove excessiveness [of the verdict] by making a comparison between the medical expense incurred and the amount of the verdict," specifically stating that "[*t*]*his type of comparison may be as unreliable as an elastic ruler.*" *Id.* (emphasis added.)

As in *Carminati*, the federal trial court judge here also properly declined to make the "unreliable as an elastic ruler" comparison between the amount of so-called specials and Mrs. Konkel's injuries when he correctly ruled that "the absence of special damages does not necessarily, and certainly does not legally, denigrate the magnitude of the impact Plaintiff's medical condition has on her life." (Appendix D at 25a.)[3]

The Fourth Circuit's suggestion that special damages are a prerequisite to recovery of significant compensatory damages conflicts with the Pennsylvania Supreme Court's decisions in *Botek* and *Carminati*, *supra*. It also conflicts with the three Pennsylvania intermediate appeals court cases cited by the Fourth Circuit in its January 4, 1999 decision, *Mineo v. Tancini*, 349 Pa. Super. 115, 502 A.2d 1300 (1985), *Kemp v. Philadelphia Transp. Co.*, 239 Pa. Super. 379, 361 A.2d 362 (1976) and *Stoughton v. Kinzey*, 299 Pa. Super. 499, 455 A.2d 1240 (1982). *Mineo* made clear that the six factors cited in *Kemp* and focused on by the Fourth Circuit *do not* constitute some sort of checklist against which a verdict must be tested. Indeed, in 1994, the Pennsylvania Supreme Court in *Haines* made it quite clear that focusing on so-called special damages and the six factors listed in *Kemp* is *not* proper. Instead, what is required is an explanation by the trial court judge as to the reasons the verdict does or does not "shock the conscience", which is precisely what the federal trial court judge provided in this

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3. The Third Circuit's holding in *Smith*, *supra*, also applying Pennsylvania law, is in accord. ("This case is one which 'injuries . . . cannot be equated in any mathematical way with any number of dollars. . . .' There is room for reasonable disagreement as to . . . the amount . . . But this verdict is not so greatly excessive as to shock the conscience of the court.") 460 F.2d at 1228.

case. 640 A.2d at 369. (*Haines* was also not discussed in the Fourth Circuit's January 4, 1999 decision.)

Stoughton, supra, an intermediate appellate opinion cited by the Fourth Circuit, actually supports the trial court judge's decision in the instant case:

> The issue of the amount of damages that a person is to be awarded for pain and suffering, both past and future, *is primarily a jury question* . . . A jury is justified in awarding *substantial* damages for pain and suffering *where the injuries are permanent and cause pain* . . . Appellant's ability to continue her employment is *not relevant* in this case because the jury was instructed not to consider her lost wages in arriving at a damage figure . . . In regard to the disparity between the amount of out of pocket expenses and the amount of the verdict, *this is only one factor to be considered and does not, in and of itself, justify granting a new trial on the ground that the verdict was excessive.*

455 A.2d at 1242 (emphasis added). Significantly, the *Stoughton* court reinstated the jury's verdict, expressly rejecting the assertion that so-called "subjective" pain is not compensable:

> Appellee contends that appellant's testimony regarding her pain was not a proper basis for the award of damages because there was *no objective documentation* of it. In a personal injury action, however, it is *totally within the jury's province* to disbelieve or believe all or part of the testimony

> of any witness and to arrive at a verdict of damages which it determines will compensate a plaintiff for his loss.

Id. at 1243 (emphasis added). *See also Tulewicz v. Southeastern Pennsylvania Transportation Authority*, 529 Pa. 584, 588, 606 A.2d 425, 426 (1991), *rev'd on other grounds* 529 Pa. 588, 606 A.2d 427 (1992) ("Absent unfairness or impartiality, the jury is entitled to the last word.")[4]

The three cases "surveyed" by the Fourth Circuit as the basis for its opinion of the proper award hardly apply. The first case, *Brown v. Paxton*, 2 A.2d 729 (Pa. 1938), was a 1938 Pennsylvania automobile whiplash case in which the plaintiff sought no medical treatment at the time of her accident, made no contemporaneous complaint of injury, and where the plaintiff's treating physicians did not even testify. The plaintiff in the second case, *Meholiff v. River Transit Co.*, 20 A.2d 762 (Pa. 1941), a 1941 case cited by the Fourth Circuit, had a minor, *curable*, knee injury that had no significant effect on his life. *Kemp*, the only other case cited by the Fourth Circuit, involved a slip and fall plaintiff whose injury consisted of a claim that "her back hurt her occasionally when the weather was bad, damp, or cold." 361 A.2d at 363. Not one of these cases presented facts even remotely similar to the evidence presented to the federal jury and trial court judge in Mrs. Konkel's case.

In this case, the jurors, as well as the federal trial court judge, but not the Fourth Circuit, heard virtually

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4. *Tulewicz* was also cited by Mrs. Konkel in her post-argument supplemental citation, but it too was not addressed in the Fourth Circuit's January 4, 1999 decision.

uncontroverted evidence of Mrs. Konkel's damages. The jurors, as well as the federal trial court judge, but not the Fourth Circuit, had the opportunity to evaluate the evidence of Mrs. Konkel's permanent, painful, life-altering injury. The decision of the jury and the federal trial court judge should be affirmed. The Fourth Circuit's decision to substitute its own opinion of Mrs. Konkel's damages, in disregard of controlling applicable Pennsylvania law, was a violation of Mrs. Konkel's right to a jury trial under the Seventh Amendment and this Court's holdings in *Gasperini*, *Dimick*, and *Feltner*, and should be reversed.

III.

THE PETITION SHOULD BE GRANTED BECAUSE THE FOURTH CIRCUIT ALSO VIOLATED FED. R. CIV. P. 54(c), FED. R. CIV. P. 56, AND MRS. KONKEL'S SEVENTH AMENDMENT RIGHT TO HAVE A JURY HEAR HER PUNITIVE DAMAGES CLAIM.

The Fourth Circuit also erred in refusing even to consider Mrs. Konkel's cross-appeal with respect to punitive damages. The district court barred Mrs. Konkel from pursing punitive damages prior to trial simply because punitive damages had not been specifically demanded in the *ad damnum* of her original complaint. The Fourth Circuit's decision to let that ruling stand conflicts with Fed. R. Civ. P. 54(c), with its own decision in *Gilbane Building Co. v. Federal Reserve Bank of Richmond*, 80 F.3d 895 (4th Cir. 1996), and with the decisions of the Courts of Appeal of the First, Third, Fifth, and Seventh Circuits. If not overturned, litigants will be required to request punitive damages in every case in order to avoid being barred from seeking them should information developed during discovery show they are appropriate.

In *Gilbane*, the Fourth Circuit expressly held that Rule 54(c) "authorizes recovery under any theory supported by the facts proven at trial." *Id.* at 900. The Fourth Circuit made clear that Rule 54(c) is not an exception to the general rules of pleading, but is merely a "clarification of the fundamental point . . . that the relief to which a claimant is entitled is not limited to the relief it requested in its original demand for judgment." *Id.* at 901, *citing New Amsterdam Casualty Co. v. Waller*, 323 F.2d 20, 24-25 (4th Cir. 1963), *cert. denied*, 376 U.S. 963 (1964). The Fourth Circuit noted in *Gilbane* that Rule 54(c) contains a mandatory requirement that the trial court "*shall* grant the relief to which the party whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." *Id.* at 901 (emphasis in original.)

Gilbane makes clear that Fed. R. Civ. P. 54(c) requires that the trial court judge give a party all relief to which she is entitled, regardless of what is requested in the party's pleadings.

Decisions of the Courts of Appeal for the First, Third, Fifth, and Seventh Circuits are in accord. In *Felce v. Fiedler*, 974 F.2d 1484, 1501 (7th Cir. 1992) the Seventh Circuit held that "Rule 54(c) 'has been liberally construed leaving no question that it is the court's duty to grant whatever relief is appropriate in the case on the facts proved.' This includes injunctive relief when appropriate, and even when not specifically requested." *Id.* at 1501, citations omitted. *See also Avitia v. Metropolitan Club of Chicago, Inc.*, 49 F.3d 1219, 1226 (7th Cir. 1995).

The holding in *Gilbane* is also consistent with the First Circuit's decisions in *Rodriguez v. Doral Mortgage Corp.*,

57 F.3d 1168, 1173 (1st Cir. 1995) and *Commercial Union Insurance Company v. Walbrook Insurance Company, Ltd.*, 41 F.3d 764, 773, n.15 (1st Cir. 1994), and with the Third Circuit's decision in *Feldman v. Philadelphia Housing Authority*, 43 F.3d 823 (3rd Cir. 1994). In *Feldman*, the Third Circuit held that Rule 54(c) entitled the trial court to award front pay in a Title VII case, even where the plaintiff in her pleadings had requested reinstatement. As the Third Circuit noted, "Relief is determined by the merits of the case, not by the pleadings." *Id.* at 832, *citing* Rule 54(c).

Likewise, the Fifth Circuit Court of Appeals has also held that Rule 54(c) "vests district courts with broad discretion to fashion a remedy, even if the remedy awarded is not specifically requested in the prayer for relief." *North Alamo Water Supply Corp. v. San Juan*, 90 F.3d 910, 918 (5th Cir. 1996), *citing International Harvest Credit Corp. v. East Coast Truck*, 547 F.2d 888, 891 (5th Cir. 1977).

The foregoing authority demonstrates that Mrs. Konkel was *not* required to request punitive damages in the *ad damnum* of her complaint in order to be able to pursue them at trial. Indeed, in its memorandum in support of its motion in limine to bar any request for punitive damages, Bob Evans expressly conceded the point:

> . . . [A] failure to specifically plead and demand exemplary damages will not bar an award of such damages under Federal Rule of Civil Procedure 54(c). . . .

Because Mrs. Konkel was not required under Fed. R. Civ. P. 54(c) to have specifically requested punitive damages in order to be entitled to recover them, it was error for the

federal court judge to grant Bob Evans' motion in limine precluding Mrs. Konkel from seeking punitive damages at trial simply because she had not requested them in the *ad damnum* of her original complaint. Instead, the district court should have denied the motion in limine.

When the district court ruled that Mrs. Konkel was required to seek punitive damages in the *ad damnum* of her complaint, Mrs. Konkel moved orally, pursuant to Fed. R. Civ. P. 15, for leave to amend the *ad damnum* of her complaint to seek punitive damages. The district court denied the motion. Although no such motion should have been required because of Rule 54(c), it was error for the district court to deny the motion to amend.

Moreover, Mrs. Konkel had moved for summary judgment with respect to punitive damages. That motion for summary judgment was opposed by Bob Evans on only two grounds. First, Bob Evans asserted that punitive damages were barred because Mrs. Konkel had not requested them in the *ad damnum* of her complaint. Second, Bob Evans asserted that Mrs. Konkel was only entitled to punitive damages if she established that she was entitled to compensatory damages. *Bob Evans filed no other opposition to Mrs. Konkel's motion for summary judgment.*

Under Rule 54(c), Bob Evans' first ground was not proper. Moreover, because Mrs. Konkel is entitled to compensatory damages, Bob Evans' only other basis for opposing Mrs. Konkel's summary judgment motion on punitive damages is also without foundation. Accordingly, because there was no legitimate opposition to Mrs. Konkel's motion for summary judgment, that motion should have been granted and she should have received punitive damages in an amount determined by a jury.

In its January 4, 1999 decision, however, the Fourth Circuit failed to address any of these arguments. Instead, in a footnote, the Fourth Circuit stated that it need not even consider Mrs. Konkel's cross-appeal of the punitive damages issue because it had decided that it was "obvious" to the Fourth Circuit that the "facts" in this case would not sustain an award of punitive damages. That was a violation of the Seventh Amendment right to a jury trial. The Pennsylvania case cited in the Fourth Circuit's footnote makes clear that punitive damages may be awarded for "*reckless*" conduct under Pennsylvania law, which is precisely what Mrs. Konkel alleged in her complaint, and which is what she argued in her motion for summary judgment the evidence established. In particular, the evidence obtained during discovery showed that Bob Evans ignored specific instructions from the manufacturer to keep the caustic cleaner (which Bob Evans knew would cause severe burns) away from the food preparation area, and back in the sink area. Instead, Bob Evans personnel used this caustic cleaner *in* the food preparation area, *and placed it in the coffee filter basket as they brewed the colorless caustic cleaner in the coffee pots next to the ones being used to serve customers hot water for tea*. The Fourth Circuit's decision that it is "obvious" that such reckless misconduct cannot give rise to a claim for punitive damages violated Fed. R. Civ. P. 54(c), 56, and Mrs. Konkel's Seventh Amendment right to a jury trial.

If the Fourth Circuit's decision is permitted to stand, this Court will be encouraging every personal injury plaintiff to request punitive damages at the time suit is filed, even if there is no real basis for doing so, simply to ensure that such damages will not be held to have been waived.

CONCLUSION

Carol Konkel suffered a life-altering, permanent esophageal injury which resulted in her never again being able to eat a normal meal without pain. She exercised her Seventh Amendment right to submit her case to a federal jury. The jury heard extensive evidence about the injury and its impact on Mrs. Konkel's life. The federal trial court judge carefully reviewed the jury's compensatory award on a Fed. R. Civ. P. 59(a) motion, and gave clear reasons why the award was proper. In substituting its own opinion for the jury's determination, the Fourth Circuit usurped the function of the jury and the trial court judge, ignored the admonitions of this Court in *Gasperini*, *Feltner*, *Dimick*, and *Hetzel* of the importance of *jury* determinations of compensatory damages under the Seventh Amendment, and ignored the applicable law as set forth in controlling Pennsylvania Supreme Court decisions. The result was a violation of Mrs. Konkel's Seventh Amendment right to a jury trial. Moreover, the decision that Mrs. Konkel was not entitled to punitive damages because she had not requested them in the *ad damnum* of her complaint was also a violation of her Seventh Amendment right to a jury trial, as well as a violation of Fed. R. Civ. P. 54(c) and 56.

The Court should grant this petition because failure to do so will encourage Courts of Appeals to ignore the Seventh Amendment and this Court's prior decisions in *Gasperini*, *Feltner*, *Dimick*, and *Hetzel*, and to impose their own opinions as to compensatory damages without the benefit of hearing a single witness. The Court should also grant the petition with respect to punitive damages to ensure that future litigants do not seek punitive damages simply out of fear

that such damages might be deemed to be waived if not sought at the time the initial complaint is filed.

For each of the foregoing reasons, Mrs. Konkel respectfully requests that her petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED AND DECIDED JANUARY 4, 1999

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 97-1824

CAROL M. KONKEL,

Plaintiff-Appellee,

v.

BOB EVANS FARMS INCORPORATED,

Defendant-Appellant,

and

ECOLAB, INCORPORATED,

Defendant.

No. 97-1867

CAROL M. KONKEL,

Plaintiff-Appellant,

v.

Appendix A

BOB EVANS FARMS INCORPORATED,

Defendant-Appellee,

and

ECOLAB, INCORPORATED,

Defendant.

Appeals from the United States District Court
for the Western District of Virginia, at Harrisonburg.
B. Waugh Crigler, Magistrate Judge.
(CA-96-20-H)

Argued: September 24, 1998

Decided: January 4, 1999

Before MURNAGHAN and HAMILTON, Circuit Judges, and MAGILL, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

* * *

OPINION

HAMILTON, Circuit Judge:

Bob Evans Farms, Inc. (Bob Evans), owner of a restaurant in Carlisle, Pennsylvania, appeals from a $1,000,000

judgment in favor of one of its customers, Carol Konkel (Konkel), as compensation for her physical and emotional damages flowing from her ingestion of hot tea, contaminated with Eco-line Finish cleaning detergent, served to her at Bob Evans.[1] The principal issue presented in this appeal is whether the magistrate judge abused his discretion in denying Bob Evans' motion pursuant to Federal Rule of Civil Procedure 59(a) for a new trial based upon the alleged excessiveness of the jury's compensatory damage award. Concluding that $25,000 in compensatory damages is the outermost award that could be sustained, we reduce the award to $25,000 or grant a new trial *nisi* remittitur at Konkel's option. With regard to the additional issues presented on appeal, we affirm the magistrate judge's denial of Bob Evans' alternative motions under Federal Rule of Civil Procedure 50(b) for judgment as a matter of law or for a new trial, his denial of Bob Evans' motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(6), his denial of Konkel's motion to amend the *ad damnum* clause of her complaint to add a request for punitive damages, and his grant of Bob Evans' motion *in limine* to exclude evidence to support a claim for punitive damages.

I

On March 22, 1994, Konkel had dinner at Bob Evans and ordered hot tea with her meal. The waitress brought Konkel

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1. Ecolab, Inc., the manufacturer of Eco-line Finish cleaning detergent, was originally also a defendant in this action. However, Konkel dismissed her claims against Ecolab, Inc. prior to trial. Ecolab, Inc. is not a party in this appeal.

a carafe full of hot water, a tea bag, and a mug.[2] After allowing the tea to steep in the carafe, Konkel poured herself a full mug of hot tea and drank it. Shortly thereafter, the waitress inquired as to whether Konkel wanted a refill of hot water so that she could have a second mug of hot tea. Upon Konkel's affirmative response, the waitress poured hot water from a coffee pot into Konkel's carafe.

Konkel waited for the tea to steep in the carafe, poured herself a second mug of hot tea, and then swallowed one mouthful of it. Upon swallowing, Konkel noticed that the hot tea tasted soapy, and she felt a burning sensation in her throat. Konkel notified Bob Evans' staff that her hot tea tasted soapy, and the waitress and the manager smelled the hot tea and stated that the hot tea smelled like the Eco-line Finish cleaning detergent that Bob Evans used to clean its coffee pots. The manager concluded that the waitress had accidentally served Konkel from a coffee pot that contained a packet of Eco-line Finish cleaning detergent.

After leaving Bob Evans, Konkel continued to suffer pain in her chest and therefore visited the emergency room. At the emergency room, Dr. Lawrence Boyler, an emergency room physician, examined Konkel, diagnosed her slightly red throat as esophageal chemical burn, and estimated that she would recover rapidly. Almost a year after the incident at Bob Evans, Konkel suffered chest discomfort and visited her family physician, Dr. Edward Cullen, who performed tests producing normal results. Thereafter, Konkel visited

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2. The carafe and the mug each could hold approximately one cup of liquid.

two gastroenterology specialists who performed tests also producing normal results.

Despite the fact that all the tests on Konkel produced normal results, one of the specialists, Dr. Nicholas Snow, diagnosed Konkel as suffering from heightened visceral nociception (HVN)[3] of the esophagus and prescribed her anti-depressants to numb the nerves in her esophagus. Dr. Snow concluded that Konkel's condition was the result of her ingestion of the "mouthful" of hot tea containing Eco-line Finish cleaning detergent at Bob Evans a year and a half earlier.

Thereafter, Konkel filed a complaint against Bob Evans in the Circuit Court of Clarke County, Virginia, alleging that Bob Evans acted negligently and in breach of its express and implied warranties "that the food and beverages served at [Bob Evans] were safe and fit for human consumption" when it served Konkel hot tea containing Eco-line Finish cleaning detergent. (J.A. 20). In her complaint, Konkel requested $1,000,000 in compensatory damages on each of her claims, but did not request punitive damages. Bob Evans subsequently removed the case to the United States District Court for the Western District of Virginia based upon diversity jurisdiction. *See* 28 U.S.C. § 1332. The case proceeded into the discovery phase, with the parties agreeing that the law of Pennsylvania applied to all substantive issues in the case.

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3. ***Dorland's Illustrated Medical Dictionary***, 1141, 1831-32, (28th ed. 1994), defines "nociception" as "pain sense" and "visceral" as pertaining to "any large interior organ in any one of the three great cavities of the body, especially in the abdomen."

Appendix A

Three days before the end of discovery, in supplemental answers to Bob Evans' interrogatories, Konkel requested punitive damages. In response, Bob Evans moved *in limine* to exclude evidence to support a claim for punitive damages because Konkel did not aver them in her complaint. Following the close of discovery, Konkel moved for summary judgment on all counts.

During a hearing on the motions, Konkel orally moved for leave to amend her *ad damnum* clause to request punitive damages, but the magistrate judge denied her motion. At the conclusion of the hearing, the magistrate judge denied Konkel's motion for summary judgment as to her negligence claim, but granted the motion as to her breach of warranties claim with respect to liability only. The magistrate judge granted Bob Evans' motion *in limine* to exclude evidence of punitive damages because Konkel did not allege sufficient facts in her complaint to give Bob Evans notice of her claim for punitive damages, and leave to amend at such a late date would prejudice Bob Evans.

The case proceeded to trial before a jury on the issue of damages for Bob Evans' breach of warranties and on the issue of whether Bob Evans' conduct constituted negligence. By consent of the parties, a magistrate judge presided over the trial. *See* 28 U.S.C. § 636(c). At trial, Konkel's theory of the case was that, as evidenced by Dr. Snow's expert testimony, Bob Evans' conduct caused her serious, substantial, and permanent physical injury that had a devastating impact on her life. Konkel testified that her HVN caused her to severely restrict her diet, thereby affecting her relationships with her husband, her family, and her friends.

Appendix A

In response to Konkel's evidence, Bob Evans introduced the testimony of Dr. Anthony Kalloo. Dr. Kalloo acknowledged that HVN was a medical condition, but opined that the data was insufficient to diagnose Konkel with HVN and that Konkel's esophagus was normal.

At the close of Konkel's evidence, Bob Evans moved for judgment as a matter of law under Federal Rule of Civil Procedure 50(a) because Konkel had not submitted medical bills or records and the only evidence of causation was Dr. Snow's testimony. The magistrate judge granted Bob Evans' motion in part, excluding testimony of any medical expenses Konkel incurred in the past or expected to incur in the future and also excluding any instruction to the jury regarding medical expenses.

At the close of evidence, Konkel moved for judgment as a matter of law pursuant to Rule 50(a) on her negligence claim. The magistrate judge granted the motion in part, concluding that as a matter of law Bob Evans had breached its duty of care, but the magistrate judge sent to the jury the issue of what compensatory damages were proximately caused by Bob Evans' conduct. Specifically, on the issue of damages, the magistrate judge instructed the jury to determine whether Konkel had suffered or would suffer damages — past or future physical pain, mental anguish, humiliation, embarrassment, inconvenience, or loss of enjoyment of life — and if so, the amount of those damages. Following its deliberations, the jury found that Konkel suffered damages in the amount of $1,000,000 as a proximate result of Bob Evans' conduct.

Subsequently, Bob Evans moved for a new trial pursuant to Federal Rule of Civil Procedure 59(a) based upon the alleged excessiveness of the jury's compensatory damage award. Specifically, Bob Evans contended that the jury's compensatory damage award was excessive because Konkel had not submitted objective medical evidence of injury, medical expenses, lost wages, lost earning capacity, or loss of employment opportunities. Bob Evans also moved for judgment as a matter of law or in the alternative for a new trial pursuant to Federal Rule of Civil Procedure 50(b). The magistrate judge issued a joint order denying the Rule 59(a) and the Rule 50(b) alternative motions because Dr. Snow's testimony provided "a legally sufficient evidentiary basis for the jury's verdict." (J.A. 552). Additionally, the magistrate judge concluded that the jury's verdict was "not against the clear weight of the evidence," and "the outcome was not a miscarriage of justice." *Id.* Accordingly, the magistrate judge entered judgment in favor of Konkel in the amount of $1,000,000.

Thereafter, Bob Evans moved for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(6) based on jury misconduct. In support of its motion, Bob Evans attached an affidavit from Bob Evans' counsel's secretary. In the affidavit, the secretary stated that she had spoken to the foreman of the jury, who told her that the jury had performed an experiment in the jury room "to determine the amount of liquid that was in the coffee pot at Bob Evans" when the waitress refilled Konkel's carafe, and in performing the experiment, had used a cup not admitted into evidence. (J.A. 566). The magistrate judge denied Bob Evans' Rule 60(b)(6) motion, concluding the jury's experiment did not

constitute jury misconduct, because the experiment was merely an examination of the admitted evidence and an application of the admitted testimony regarding the concentration of the detergent in the hot water served to Konkel.

Bob Evans subsequently filed a timely notice of appeal, and Konkel filed a timely notice of cross-appeal. On appeal, Bob Evans contends that the magistrate judge erred in denying its Rule 50(b) motion for judgment as a matter of law, its alternative Rule 50(b) motion for a new trial, its Rule 59(a) motion for a new trial, and its Rule 60(b)(6) motion for relief from judgment. On cross-appeal, Konkel alleges that the magistrate judge erred in denying her oral motion to amend her *ad damnum* clause to add a request for punitive damages and in granting Bob Evans' motion *in limine* to exclude evidence related to punitive damages.

II

First, we address Bob Evans' argument that the evidence was not sufficient to support the jury's findings of causation, including its obvious finding that Konkel suffered from HVN as a result of Bob Evans' conduct, and that therefore, the magistrate judge erred in denying its alternative motions under Rule 50(b) for judgment as a matter of law or for a new trial. We review a district court's denial of a Rule 50(b) motion for judgment as a matter of law *de novo*. *See White v. County of Newberry*, 985 F.2d 168, 172 (4th Cir. 1993). A Rule 50(b) motion should be granted if a district court determines, without weighing the evidence or considering the credibility of the witnesses, that substantial evidence does

not support the jury's findings. *See id.* In reviewing a district court's decision on a Rule 50(b) motion, we view all the evidence in the light most favorable to the prevailing party and draw all reasonable inferences in his or her favor. *See Austin v. Torrington Co.*, 810 F.2d 416, 420 (4th Cir. 1987). We review a denial of a motion for a new trial under Rule 50(b) for abuse of discretion. *See Bristol Steel & Iron Works, Inc. v. Bethlehem Steel Corp.*, 41 F.3d 182, 186 (4th Cir. 1994).

The question before us is whether Konkel presented sufficient evidence to support the jury's finding that she suffered damages that were proximately caused by Bob Evans' conduct. In order to establish proximate cause under Pennsylvania law, the plaintiff must show by a preponderance of the evidence that the defendant's acts or omissions were a substantial factor in causing the plaintiff's harm. *See First v. Zem Zem Temple*, 686 A.2d 18, 21 (Pa. Super. 1996).

Konkel presented the testimony of Dr. Snow that the likely permanent HVN she suffered was caused by Bob Evans' conduct. In response, Bob Evans presented the testimony of Dr. Kalloo, who opined that the data was insufficient to diagnose Konkel with HVN and that Konkel's esophagus was normal. Obviously, it was up to the jury to decide which expert — Dr. Snow or Dr. Kalloo — was more credible. Through its verdict, it is evident that the jury found Dr. Snow more credible, and we are in no position to take issue with that finding. In short, Dr. Snow's testimony was sufficient to support a reasonable jury's finding that Bob Evans' conduct was a substantial factor in causing Konkel's HVN.

Accordingly, we conclude that the magistrate judge's denial of Bob Evans' motion for judgment as a matter of law under Rule 50(b) was proper.[4]

III

Next, we address Bob Evans' contention that the $1,000,000 compensatory damage award is excessive, and therefore, the magistrate judge erred in denying its Rule 59(a) motion for a new trial based upon the alleged excessiveness of the jury's compensatory damage award.

We review a district court's denial of a Rule 59(a) motion for a new trial based upon the alleged excessiveness of the jury's compensatory damage award for abuse of discretion, giving "the benefit of every doubt to the judgment of the trial judge." *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 438-39 (1996). Whether a jury award is excessive is a question of law. *See id.* at 436-38. If we find a jury's damage award excessive, we may "grant a new trial *nisi* remittitur, which gives the plaintiff the option of accepting the remittitur or of submitting to a new trial." *Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294, 305 n.2 (4th Cir. 1998).

The Supreme Court in *Gasperini* addressed the appropriate standard under which a district court must evaluate a Rule 59(a) motion for a new trial based upon the alleged

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4. For the reasons stated above, we conclude that the magistrate judge's denial of Bob Evans' alternative Rule 50(b) motion for a new trial was not an abuse of discretion. *See James v. Jacobson*, 6 F.3d 233, 239 (4th Cir. 1993).

excessiveness of the jury's compensatory damage award. *See Gasperini*, 518 U.S. at 438-39. The Supreme Court determined that because the doctrine of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), "precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court," *Gasperini*, 518 U.S. at 430-31, a district court sitting in diversity must apply state law standards when it considers a Rule 59(a) motion for a new trial based upon the alleged excessiveness of the jury's compensatory damage award. *See id.* at 438-39.

Gasperini overruled our circuit precedent that called for district courts sitting in diversity to apply federal law in determining the merits of a motion pursuant to Rule 59(a) for a new trial based upon the alleged excessiveness of the jury's verdict. *See Johnson v. Parrish*, 827 F.2d 988, 991 (4th Cir. 1987). Specifically, in our circuit prior to *Gasperini*, a district court was required to set aside a jury's verdict as excessive "even when such a verdict is supported by substantial evidence 'if [it] is of the opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice.' " *Johnson*, 827 F.2d at 991 (quoting *Aetna Cas. & Sur. Co. v. Yeatts*, 122 F.2d 350, 352 (4th Cir. 1941)).

Under the Supreme Court's mandate in *Gasperini*, the magistrate judge was required to apply Pennsylvania law in determining whether the jury's $1,000,000 compensatory damage award in favor of Konkel was excessive. Under Pennsylvania law, a jury's damage award is considered excessive if it does not fall "within the necessarily uncertain limits of fair and reasonable compensation in the particular

case" or if the award "so shocks the sense of justice as to compel the conclusion that the jury [was] influenced by partiality, prejudice, mistake, or corruption." *Carminati v. Philadelphia Transp. Co.*, 176 A.2d 440, 445 (Pa. 1962).

Here, the magistrate judge applied federal law in testing the jury's compensatory damage award for excessiveness, concluding that it was not against the clear weight of the evidence and was not a miscarriage of justice. Such application was erroneous in light of *Gasperini*. Because the magistrate judge applied the wrong standard in testing the jury's compensatory damage award for excessiveness, a remand is required unless we conclude that the magistrate judge would have reached the same result applying Pennsylvania law as he did applying federal law.

Applying federal law, the magistrate judge concluded that the jury's compensatory damage award was not against the clear weight of the evidence and was not so excessive as to be a miscarriage of justice. Because the federal excessiveness standard is analogous to the Pennsylvania excessiveness standard, to say that the magistrate judge would not have concluded that the jury's compensatory damage award was "within the necessarily uncertain limits of fair and reasonable compensation in the particular case" and was not so extravagant that it "so shocks the sense of justice as to compel the conclusion that the jury [was] influenced by partiality, prejudice, mistake, or corruption," *Carminati*, 176 A.2d at 445, would strain credulity. Therefore, because the magistrate judge would have reached the same result applying Pennsylvania law as he did applying federal law, a remand is not only unwarranted but would be a waste of judicial

resources. Accordingly, we turn to consider whether the magistrate judge's denial of Bob Evans' motion for a new trial based upon the alleged excessiveness of the jury's compensatory damage award was an abuse of discretion.

The Pennsylvania courts apply the following factors when determining whether a jury's damage award is excessive: "(1) the severity of the injury; (2) whether the injury is demonstrated by objective physical evidence or subjective evidence; (3) whether the injury is permanent; (4) the plaintiff's ability to continue employment; (5) disparity between the out of pocket expenses and the amount of the verdict; and (6) damages plaintiff requested in his complaint." *Stoughton v. Kinzey*, 445 A.2d 1240, 1242 (Pa. Super. 1982). As Pennsylvania courts have recognized, because the circumstances of each case are unique, only those factors relevant to the particular case at issue should be considered. *See Mineo v. Tancini*, 502 A.2d 1300, 1305 (Pa. Super. 1986).

In this case, we believe the jury's compensatory damage award is not "within the necessarily uncertain limits of fair and reasonable compensation." *Carminati*, 176 A.2d at 445. Although the testimony of Dr. Snow indicates that Konkel's likely permanent HVN was caused by Bob Evans' conduct, Konkel produced no objective physical evidence concerning her injury, no evidence of lost wages, no evidence of lost future earning capacity, no evidence of loss of future employment, and no evidence of out-of-pocket expenses. When the lack of this evidence is viewed in connection with Konkel's evidence concerning the severity and permanency of her injury, it becomes evident that Pennsylvania courts

would view this compensatory damage award as excessive. *See also Kemp v. Philadelphia Transp. Co.*, 361 A.2d 362, 364-66 (Pa. Super. 1976) (finding damage award of $15,000 excessive where woman complained of knee and back pain but there was no objective medical evidence, no evidence of permanency, no evidence of lost earning capacity, and whose out-of-pocket expense were only $535) (citing *Meholiff v. River Transit Co.*, 20 A.2d 762, 764-65 (Pa. 1941) (reducing verdict when prediction of permanency was based upon plaintiff's subjective claims of pain); *Brown v. Paxton*, 2 A.2d 729, 730-31 (Pa. 1938) (reducing verdict when evidence showed that plaintiff continued at same employment with no lost earning capacity)). In our view, taking into account the relevant factors under Pennsylvania law, an award of $25,000 is the outermost award that could be sustained. We, therefore, reduce the jury's compensatory damage award to $25,000 or grant a new trial *nisi* remittitur at Konkel's option.

IV

Next, we turn to Bob Evans' allegation that the magistrate judge erred in denying its motion for relief from judgment under Federal Rule of Civil Procedure 60(b)(6) based upon jury misconduct. According to Bob Evans, the jury's experiment using a cup not admitted into evidence constituted jury misconduct.

This Court will not disturb a district court's denial of a Rule 60(b)(6) motion absent an abuse of discretion. *See National Org. for Women v. Operation Rescue*, 47 F.3d 667, 669 (4th Cir. 1995). We conclude that the magistrate judge did not

abuse his discretion in denying Bob Evans' Rule 60(b)(6) motion. Accordingly, we affirm on this issue.

Experiments performed by juries, "which have the effect of putting them in possession of evidence not offered at trial," constitute jury misconduct requiring a new trial, unless no prejudice results. *See United States v. Beach*, 296 F.2d 153, 158 (4th Cir. 1961). However, jury experiments that are merely more critical examinations of exhibits than the examinations made during the trial are not objectionable. *See id.* at 158-59.

The affidavit submitted by Bob Evans indicates that the jury performed an experiment "to determine the amount of liquid that was in the coffee pot" containing the packet of Eco-line Finish cleaning detergent. (J.A. 566). In performing this experiment, the jury, according to the affidavit, used the coffee pot and carafe, which were both exhibits, and a cup, which had not been admitted into evidence. The jury then "read the directions off the packet of detergent that was an exhibit and found that the liquid solution swallowed by [Konkel] was twelve times stronger than it was supposed to be." *Id.*

We conclude that the jury's experiment did not constitute jury misconduct. The jury simply examined the coffee pot, carafe, and packet of detergent that were admitted into evidence and applied the testimony that coffee pots at Bob Evans were cleaned with one packet of detergent, the testimony that the carafe was practically empty when the waitress refilled it with water from the coffee pot, and the testimony that the mug from which Konkel drank the soapy solution could hold approximately one cup of liquid. Because the jury simply applied the testimony concerning the size of

Konkel's mug, the jury's experiment did not place it in possession of evidence not presented at trial. Accordingly, we conclude that the jury's experiment using a cup not admitted into evidence did not constitute jury misconduct. We therefore affirm the magistrate judge's denial of Bob Evans' Rule 60(b)(6) motion.[5]

V

For the reasons stated above, we reduce the jury's compensatory damage award to $25,000 or grant a new trial *nisi* remittitur at Konkel's option. In accord with *In re Board of County Supervisors*, 143 F.3d 835, 842 (4th Cir. 1998), the new trial may be " 'upon the whole case' " or limited to the issue of damages alone, at the election of Konkel. *Id.* (quoting *Kennon v. Gilmer*, 131 U.S. 22, 30 (1889)). In all other respects, we affirm the judgment.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

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5. To the extent that Konkel raises on cross-appeal that the magistrate judge erred in denying her oral motion to add a request for punitive damages in her *ad damnum* clause and the magistrate judge erred in granting Bob Evans' motion *in limine* to exclude evidence of punitive damages because Konkel did not aver punitive damages in her complaint, we conclude that we need not address her claims because, as is obvious, the facts in this case could not sustain an award for punitive damages under Pennsylvania law, and Konkel has proffered no evidence in this regard. *See Feld v. Merriam*, 485 A.2d 742, 747-48 (Pa. 1984) (noting that punitive damages may be awarded in Pennsylvania for conduct that is "malicious, wanton, reckless, willful, or oppressive") (internal quotation marks omitted).

APPENDIX B — ORDER OF JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, HARRISONBURG DIVISION DATED, ENTERED AND FILED APRIL 24, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

CIVIL ACTION NUMBER 96-0020-H

CAROL M. KONKEL,

Plaintiff

v.

BOB EVANS FARMS, INC., *ET AL.*,

Defendants

ORDER OF JUDGMENT

By: B. Waugh Crigler
U.S. Magistrate Judge

Upon return of the verdict of the jury on April 16, 1997, it is

ORDERED AND ADJUDGED

that plaintiff shall have and recover compensatory damages against defendant Bob Evans Farms, Inc., in the amount of

Appendix B

One Million Dollars ($1,000,000.00) together with interest at the statutory judgment rate from the date hereof.

The Clerk of the Court shall remove this case from the active docket of the court.

The Clerk of the Court is hereby directed to send a certified copy of this Order to all counsel of record.

ENTERED: s/ B. Waugh Crigler
United States Magistrate Judge

April 24, 1997
Date

APPENDIX C — FINAL ORDER OF JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, HARRISONBURG DIVISION DATED, ENTERED AND FILED MAY 23, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

CIVIL ACTION NUMBER 96-0020-H

CAROL M. KONKEL,

Plaintiff

v.

BOB EVANS FARMS, INC., *ET AL.*,

Defendants

FINAL ORDER OF JUDGMENT

By: B. Waugh Crigler
U.S. Magistrate Judge

For the reasons set forth in the Memorandum Opinion of even date, it is

ORDERED

as follows:

Appendix C

(1) Defendant's April 28, 1997 motion for judgment as a matter of law or in the alternative for a new trial pursuant to Rule 50(b)(1)(B)-(C) hereby is DENIED.

(2) Defendant's April 28, 1997 motion for a new trial pursuant to Rule 59(a) or in the alternative to amend the judgment hereby is DENIED.

(3) Plaintiff's April 23, 1997 motion for delay damages hereby is GRANTED. In addition to the damages set forth in this court's April 24, 1997 Order of Judgment, plaintiff shall have and recover delay damages from defendant Bob Evans Farms, Inc. in the amount of $5,336.54.

(4) Plaintiff's April 28, 1997 Bill of Costs hereby is GRANTED. The Clerk hereby is directed to tax as costs against defendant Bob Evans Farms, Inc. the sum of $2,962.80.

The Clerk of the Court hereby is directed to remove this case from the docket of the court and to send a certified copy of this Order to all counsel of record.

ENTERED: s/ B. Waugh Crigler
United States Magistrate Judge

May 23, 1997
Date

APPENDIX D — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, HARRISONBURG DIVISION DATED, ENTERED AND FILED MAY 23, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

CIVIL ACTION NUMBER 96-0020-H

CAROL M. KONKEL,

Plaintiff

v.

BOB EVANS FARMS, INC., *ET AL.*,

Defendants

MEMORANDUM OPINION

By: B. Waugh Crigler
U.S. Magistrate Judge

Before this court are defendant's April 28, 1997 motions for judgment as a matter of law, to amend judgment, and for a new trial under Fed. R. Civ. P. 50(b) and 59 as well as plaintiff's April 23, 1997 motion for delay damages and April 25, 1997 motion for the award of costs. For the reasons set forth herein, an Order will enter denying defendant's motions for judgment as a matter of law, to amend judgment, and for

a new trial, but granting plaintiff's motions for delay damages and for the award of costs.

Defendant asserts that the verdict was not supported by the evidence and that judgment should be granted in its favor. Defendant further asserts that the court should grant a new trial, in short, because the verdict was grossly disproportionate to plaintiff's evidence of injury. In support of its assertions, defendant notes that plaintiff failed to offer any evidence of special damages such as medical bills or lost wages and that there was no objective medical evidence to support plaintiff's complaints of pain and discomfort.

The court must grant judgment as a matter of law when "a party has been fully heard . . . and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party." *Towler v. Sayles*, 76 F.3d 579, 581 (4th Cir. 1996) (quoting Fed. R. Civ. P. 50(a)(1)). On a motion for a new trial under Fed. R. Civ. P. 59, the court must set aside the verdict and grant a new trial if it determines that "[1] the verdict is against the clear weight of the evidence, or [2] is based upon evidence which is false, or [3] will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict." *Atlas Food Systems and Serv. v. Crane Nat'l Vendors*, 99 F.3d 587, 594 (4th Cir. 1996). This court is of the view that there is a legally sufficient evidentiary basis for the jury's verdict in this case, is satisfied that the jury's verdict is not against the clear weight of the evidence, believes the verdict is based on truthful evidence, and is convinced that the outcome was not a miscarriage of justice.

Appendix D

There was competent, and now what can be seen in the jury's mind, credible evidence that plaintiff suffered a diagnosable neurologic condition that was caused by ingesting chemicals served to her by defendant. Plaintiff's treating physician set forth the bases of his opinions, explaining fully the nature of the condition and its likely causes and effects. Remarkably, defendant's expert could not deny that plaintiff suffered from the condition. He simply testified that he would have performed a different test to determine the condition's existence. Plaintiff's physician, on the other hand, explained that such test would likely exacerbate plaintiff's condition and her symptoms and that such test was not necessary to diagnose the condition.

The court believes that a jury was entitled to give greater weight to a treating doctor's diagnosis and opinions than to a specially retained expert. This is so because the treating physician has observed the patient over a longer period of time. In essence, the jury had before it a highly qualified treating clinician and a highly qualified teaching physician who had no dispute over whether there was such a condition as heightened visceral nociception, but who simply disagreed as to how the diagnosis should have been made in this case. A more classic case for resolution by a jury could not be presented. That it was resolved adversely to defendant provides no legal grounds for relief at this juncture.

Furthermore, the court does not accept defendant's contention that plaintiff's election not to present medical specials renders the jury verdict excessive. There is no dispute that plaintiff visited an emergency room, had follow-up treating care and saw outside specialists for her

condition. Even the defendant's consulting physician could not tell the jury that the emergency room diagnosis was wrong. In fact, he steered clear of such assertion. Moreover, there was evidence, which the jury had the right to accept and apparently did accept, that showed plaintiff suffered a serious but essentially untreatable condition whose duration was indefinite but likely permanent.

The defendant had a right to assail the absence of any special damages when its counsel argued the matter before the jury and, in fact, asked the jury to assess that in arriving at its verdict. However, the absence of special damages does not necessarily, and certainly does not legally, denigrate the magnitude of the impact plaintiff's medical condition has had on her life. Obviously the jury concluded the impact was great and compensated her accordingly.

Defendant also disputes whether Rule 238 of the Pennsylvania Rules of Civil Procedure should be applied here to allow plaintiff's recovery of delay damages. Federal courts sitting in diversity cases must apply the substantive law, including the conflict of law rules, of the forum state. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). Under Virginia conflict of law rules, as conceded by the parties, the substantive law of Pennsylvania applies. However, defendant asserts that Pennsylvania Rule 238 is procedural in nature and, thus, should not be applied in this diversity action. The greater weight of authority persuades the court that the Pennsylvania delay damage rule is substantive and not procedural and, therefore, must apply.

Rule 238 essentially provides for prejudgment interest in cases involving bodily injury for the period beginning one

year after plaintiff filed her complaint until the date of verdict. *Yohannon v. Keene Corp.*, 924 F.2d 1255, 1263-64 (3d Cir. 1991). State law governs damage awards because damages are a matter of substantive law. *See Gasperini v. Center for Humanities, Inc.*, __ U.S. __, 116 S. Ct. 2211, 2220 (1996) (statutory cap on damages is substantive law for *Erie* purposes); *Browning-Ferris Industries v. Kilco Disposal*, 492 U.S. 257, 278 (1989) (award of punitive damages is a matter of substantive law); *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 99 (4th Cir. 1991) (federal court sitting in diversity must apply state law regarding punitive damages). Prejudgment interest is considered to be an element of damages. *Library of Congress v. Shaw*, 478 U.S. 310, 321 (1986). Thus, this court is bound by state law to apply Pennsylvania Rule 238 which compels the award of prejudgment interest in this case. *Accord Thornhill v. Donnkenny, Inc.*, 823 F.2d 782, 787 (4th Cir. 1987) (district court must apply New York's law on prejudgment interest in a diversity case governed by New York substantive law); *see also Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330 (1988) (holding in an FELA action that prejudgment interest under Rule 238 constitutes too substantial a part of a defendant's potential liability to be a mere local rule of procedure).

Finally, the court concludes that the costs set forth in plaintiff's bill of costs are reasonable and were necessarily incurred in the presentation of the case. Plaintiff shall be awarded these costs which come to $2,962.80 under 28 U.S.C. § 1920(1)-(2).

An Order will enter accordingly.

Appendix D

The Clerk of the Court is hereby directed to send a certified copy of this Memorandum Opinion to all counsel of record.

ENTERED: s/ B. Waugh Crigler
United States Magistrate Judge

May 23, 1997
Date

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, HARRISONBURG DIVISION DATED, ENTERED AND FILED FEBRUARY 24, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

CIVIL ACTION NUMBER 96-0020-H

CAROL M. KONKEL,

Plaintiff

v.

BOB EVANS FARMS, INC., *ET AL.*,

Defendants

ORDER

By: B. Waugh Crigler
U.S. Magistrate Judge

For the reasons set forth from the bench on February 7, 1997, it is

ORDERED

as follows:

Appendix E

(1) Plaintiff's verbal motion to amend the ad damnum to request punitive damages from defendant Bob Evans Farms, Inc., ("Bob Evans") hereby is DENIED.

(2) The January 16, 1997 motion *in limine* to bar any claim for punitive damages against Bob Evans hereby is GRANTED.

(3) Plaintiff's January 17, 1997 motion for summary judgment against Bob Evans hereby is GRANTED, in part, and DENIED, in part. Summary judgment hereby is GRANTED in favor of plaintiff on COUNT II, Breach of Warranty, with respect to liability only. Summary judgment hereby is DENIED on the issue of damages on COUNT II and on all other claims against Bob Evans.

(4) Plaintiff's January 17, 1997 motion for summary judgment against Ecolab, Inc., ("Ecolab") hereby is DENIED.

(5) The motion for summary judgment filed by Bob Evans on January 16, 1997 hereby is DENIED.

(6) The motion for summary judgment filed by Ecolab on January 17, 1997 hereby is DENIED.

(7) The motion to exclude plaintiff's expert testimony filed by Bob Evans on January 16, 1997 hereby is DENIED.

(8) By agreement of counsel, and with the concurrence of the court, this case shall be tried before the undersigned and a seven-member jury on April 14, 15, and 16, in the

Appendix E

United States District Court, Harrisonburg, Virginia, with the proceedings to commence at 9:30 a.m. each day.

(9) Plaintiff's January 17, 1997 motion for use of deposition in lieu of appearance hereby is GRANTED.

The Clerk of the Court is hereby directed to send a certified copy of this Order to all counsel of record.

ENTERED: s/ B. Waugh Crigler
United States Magistrate Judge

February 24, 1997
Date

APPENDIX F — EXCERPTS FROM TRANSCRIPT OF HEARING OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, HARRISONBURG DIVISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT DATED FEBRUARY 7, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

Civil Action No.
696-0020-H

CAROL M. KONKEL,

Plaintiff,

– vs –

BOB EVANS FARMS, INC., and ECOLAB, INC.,

Defendants.

Harrisonburg, VA
February 7, 1997
9:30 a.m.

TRANSCRIPT OF HEARING ON
CROSS-MOTIONS FOR SUMMARY JUDGMENT
BEFORE THE HONORABLE B. WAUGH CRIGLER
UNITED STATES MAGISTRATE JUDGE

* * *

Appendix F

[67] THE COURT: Well, I think to turn that around, your position is that a restaurateur exercising reasonable care would not serve a product containing this cleaner.

MR. KLENKAR:

* * *

Oh, last issue, on punitive damages, Your Honor. We have moved for summary judgment that there be a finding that Bob Evans' conduct as a matter of law was so reckless that it establishes punitive damages in an amount to be determined by the jury. It's appropriate under Rule 56 that the Court can make partial determinations, under 56(c) and (d), as to certain facts. If you can find that no reasonable jury could conclude that their conduct was not reckless, you're entitled to punitive damages. We'll have evidence on that.

They've suggested in their motion in limine to exclude that, which is incorporated by reference in [69] their brief in opposition to our motion for summary judgment, that we cannot seek punitive damages against Bob Evans because, in our original complaint, we did not request punitive damages. Rule 54(c) does not require that and specifically provides that a party can recover damages relief not asked for in the pleadings. Their whole brief is premised on the —

THE COURT: Well, only to the extent that the evidence is conformed to the pleadings after the evidence has been introduced. Would you agree?

MR. KLENKAR: Yes, Your Honor, and the evidence here —

THE COURT: Okay. Now, see, we have a different setting. That's after all of the evidence has come in in the trial and nobody has raised Cain about it and you stand up and you say, "Your Honor, I want to conform the pleadings to the proof in the case that has been received into evidence without objection, and that proof would allow me to recover X."

Now, that's the context in which Rule 54, conforming the pleadings to the proof, is made, unless I'm just out to lunch, but that's what I remember.

MR. KLENKAR: You're not out to lunch.

[70] THE COURT: I haven't had this issue in a long time.

MR. KLENKAR: The important issue, Your Honor, is the suggestion that Bob Evans makes that we would need to amend our pleading prior to seeking punitive damages is simply wrong, and on that I need you to understand a couple of factual issues.

We pled that their conduct was reckless, which is enough to state a claim under Pennsylvania law. You don't have to have the intention or willful conduct. Reckless does it. Bob Evans knew that the Pennsylvania law applied from the time that we first filed this motion for judgment in state court. They suggest that we let them know at a very late stage in

the game that we were seeking punitive damages. It is true that we did let them know right at the end of the discovery period, but it was before they took the plaintiff's deposition. It was three days before they took the plaintiff's deposition. They cannot claim surprise. They've got plenty of time to prepare for trial.

The only Bob Evans witness, there was one Bob Evans witness who had testified, and that Bob Evans witness, I don't think they're going to say that he would have changed all his testimony as to what [71] factually happened if he had known there was a punitive damages claim. I don't think prejudice is relevant because I think that only applies under a Rule 15 motion to amend. But even if it did apply and if it were relevant, they're not prejudiced.

We're seeking punitive damages. There's no real discovery to be conducted on punitive damages. If there is, you can ask the plaintiff the basis for it, and they took the deposition after the claim for punitive damages.

THE COURT: Actually, the conforming the pleadings to the evidence is Rule 15, not 54.

MR. KLENKAR: Well, I was trying to be polite, Your Honor. I knew you would look up the two rules. 54(c) I cited in my memorandum in opposition —

THE COURT: But 54(c) has to do with judgment.

MR. KLENKAR: Right, right. You don't have to have the pleadings changed to get the relief. If that were the case,

under 54(c), 54(c) would say, if you want to do that, then see Rule 15. It doesn't. It says it doesn't matter what the pleadings say. You can get the relief to which you are entitled.

We're going to be entitled to punitive damages. [72] I submit, for purposes of summary judgment, we've shown enough to establish right now that we're entitled to punitive damages. But there's no requirement that we amend our pleading at all, and so I would reject their motion that the punitive damages claim should be thrown out because we haven't amended. We don't have to amend under Rule 15. If you take that view, 54(c) is irrelevant.

THE COURT: Well, I'm going to resolve that right now. It's my opinion that 54(c) deals with an award of damages more than what was prayed for but at least consistent with the form of relief that was prayed for, and it essentially says, "Except as to a party against whom a judgment is entered by default" — we understand why that is — "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings."

When it comes to matters of punitive damages, though, it is this Court's belief that a defendant is entitled to notice that that kind of relief is being sought. It is more than just simply saying, "Are you going to grant full relief?" It is a notice issue, because there are defenses to punitive damages that [73] essentially now have become constitutional defenses that can be raised and not raised. And I think if we use Rule 54 to allow an assessment of punitive damages, when it's

never been prayed for to begin with and the defendants are not on notice that punitive damages are asked for specifically, even if the pleadings contain words like "reckless" or "careless" or "malicious" or things like that, if punitive damages are not prayed for, defendants have a right to rely on that in the development of their case, that they are free from punitive damages because that has not been asked for, nor has an amendment been sought to allow for it. I mean, that's just my view.

MR. KLENKAR: Your Honor, before you — if I may cite two cases to you which are directly —

THE COURT: Are they Fourth Circuit cases?

MR. KLENKAR: One is the Eastern District of Virginia, Norfolk Division, 1987.

THE COURT: Who's the judge? Is it Judge Hoffman?

MR. KLENKAR: Judge Clarke.

THE COURT: What did he say?

MR. KLENKAR: He rejected the argument that if you don't plead punitive damages, specifically ask [74] for it, you're not entitled, and Judge ~~Clarke sided~~ with the —

THE COURT: Can I just cite one thing? I have a lot of respect for Judge Clarke. I've known him for years. I played football with his son. He and I played next to each other on the football team. But I want to say this: A lot of water has

gone over the dam about what are and aren't punitive damages since that decision was rendered and about what kind of effects punitive damages have in these kinds of cases and what defenses can be asserted against them. And I don't think that that was decided in the same legal context that punitive damages now can be awarded when Judge Clarke decided that case a long time ago. That wasn't long after he went on the bench.

MR. KLENKAR: The only point I would add to that, Your Honor, is that the case that Judge Clarke cites for authority is the first one I've attached to my memorandum in opposition to that motion in limine. It's a *Griffith* case. It's a Southern District of New York case. It's exactly and directly on point, and what it —

THE COURT: And I appreciate it, and I'm not saying that I own the book or that I'm right [75] about it, but I want to tell you, I just want you to know what my position is, because I think at this juncture, if you haven't asked for punitive damages and you're not asking to amend your complaint or anything like that, and summary judgment may be too late for that anyway, I think I need to rule that you're not entitled to punitive damages as a matter of law.

MR. KLENKAR: If that is the Court's position, I would move at this point, Your Honor, orally for leave to amend our addendum to request punitive damages against Bob Evans.

THE COURT: And I would deny it.

MR. KLENKAR: I believe that's all I have, Your Honor, with respect to our motion for summary judgment and responding to the defendants.

THE COURT: Lori, make sure you make a note about that, because I need to cover this. This case, I thought maybe I would be able to announce what I was going to be able to do from the bench, but I'm not so sure. There's no trial date set, right?

MR. KLENKAR: Yes, there is, Your Honor.

MR. BANCROFT: Yes.

MR. MORGAN: April, I believe it's the 14th or thereabouts, Your Honor.

* * *

(Recess from 11:22 a.m. to 11:30 a.m.)

THE COURT: The case is before the Court on cross-motions for summary judgment, the plaintiff moving for summary judgment on the issues of liability for negligence and breach of warranty and seeking an award of summary judgment on the question of punitive damages.

I'm going to take that up first, because I indicated what I would do earlier, and I do want this record to reflect that I'm announcing this decision [93] from the bench, as laconic as it may be, because of two reasons. First of all, if the parties essentially do consent and the case is transferred, then the

matter is dealt with and they know where they're going. And even if they don't consent, then I've put my thoughts on the record, and the only thing I would follow up with is a brief report and recommendation adopting what I've done here in open court.

The punitive damage issue, it is this Court's belief that punitive damages were never sought in a complaint or an amended complaint, that the type of conformity that Rule 54 talks about is not granting relief that has not been prayed for specially in the sense of punitive damages but granting greater relief of the same character that is prayed for in the complaint. Whereas Rule 15 allows the amendment of a complaint to conform to the proof, it is this Court's considered opinion that punitive damages have become by decisional authority a category of damages that needs to be sought against which the defendants have notice so that they may file defenses, even constitutional defenses, that they may have. And so therefore I believe, under the circumstances of this case, it would be error for this Court either to [94] permit the recovery in general of punitive damages or plaintiff to seek them before the jury or to certainly award them in summary judgment, and I decline to do either. Yeah?

MR. KLENKAR: Your Honor, that is solely with respect to defendant Bob Evans.

THE COURT: Okay.

MR. KLENKAR: Is that — that is correct, counsel? I mean, we did plead them as to the defendant Ecolab.

Appendix F

THE COURT: As to Bob Evans, this is the plaintiff against Bob Evans.

MR. BANCROFT: Right.

MR. KLENKAR: Thank you, Your Honor, for that clarification.

THE COURT: You're not moving for summary judgment on Ecolab except as to punitive damages.

MR. KLENKAR: Well, no. With respect to Ecolab, I'm moving for summary judgment solely on this strict liability claim.

THE COURT: Oh, okay, right, but not on damages.

MR. KLENKAR: Yes, sir.

THE COURT: Right. So this is as to Bob Evans. As to negligence, these are my thoughts: . . .

* * * *

APPENDIX G — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED APRIL 26, 1999

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-1824
CA-96-20-H

CAROL M. KONKEL

Plaintiff – Appellee

v.

BOB EVANS FARMS, INCORPORATED

Defendant – Appellant

and

ECOLAB, INCORPORATED

Defendant

No. 97-1867
CA-96-20-H

CAROL M. KONKEL

Plaintiff – Appellant

v.

BOB EVANS FARMS, INCORPORATED

Defendant – Appellee

Appendix G

and

ECOLAB, INCORPORATED

Defendant

On Petition for Rehearing and Rehearing En Banc

The appellee/cross-appellant has filed a petition for rehearing and rehearing en banc.

Judges Murnaghan, Judge Hamilton and Senior Circuit Judge MaGill, of the United States Court of Appeals for the Eighth Circuit sitting by designation voted to deny the petition for rehearing.

A member of the Court requested a poll on the petition for rehearing en banc. The poll failed to produce a majority of judges in active service in favor of rehearing en banc. Judges Widener, Wilkins, Michael and King voted to rehear the case en banc, and Chief Judge Wilkinson, and Judges Murnaghan, Ervin, Niemeyer, Hamilton, Luttig, Williams, Motz and Traxler voted against rehearing en banc.

The Court denies the petition for rehearing and rehearing en banc.

Entered at the direction of Judge Hamilton for the Court.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX H — RELEVANT RULE

Fed. R. Civ. P. 56

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the

whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Appendix H

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

* * * *